



consolidate the cases. We gave the Director until October 8, 2004, to respond, but he did not. By order dated October 14, 2004, we consolidated No. 04-0979 DI into No. 04-1128 DI.

On January 12, 2005, we held a hearing on the complaint. Stephen R. Gleason, counsel for the Department of Insurance, represented the Director. Dorothy White-Coleman, with White-Coleman & Associates, LLC, represented Glass and VMG. The matter became ready for our decision on June 3, 2005, the date the reply brief was filed.

### **Findings of Fact**

1. Glass held a Missouri insurance producer license that expired on June 24, 2004. The license authorized Glass to sell "Accident and Health, Life and Variable Contracts" insurance. Glass held his license since 1998, and had never had any prior complaints against him.

2. VMG holds an insurance business entity producer license that will expire on November 7, 2005.

3. Glass is, and was at all relevant times, the sole owner and sole officer of VMG.

4. Nicole Childress, who worked at VMG, was licensed to sell property and casualty insurance during all relevant times.

### **James' Insurance Premium**

5. Before February 10, 2003, Childress quoted rates for a homeowners policy to Sonya James.

6. On February 10, 2003, Glass met James at VMG. He accepted an application and a \$898 payment on an insurance policy with American Modern Homes because Childress was not in the office. Glass did not quote rates or sell the policy to James.

7. After accepting the payment, Glass gave James' application to Childress for processing. The check was deposited into the VMG business account.

8. Glass did not sell or quote rates concerning automobile insurance to James.<sup>1</sup>

9. On February 18, 2003, Graham-Rogers, Inc., a managing general agent, terminated its producer's agreement with VMG. As part of that agreement, Graham-Rogers and VMG had an automatic withdrawal process for premiums once the insurance application was received. Because James' application was sent for processing around the time of termination, Graham-Rogers did not withdraw the premium payment.

10. James was without insurance for a period of time.

11. In October 2003, James had a claim for damaged carpet. She contacted American Modern Home Insurance Company and discovered that she did not have a policy. She telephoned Glass.

12. Glass investigated and determined that the premium had not been paid to American Modern Home Insurance Company. He paid James \$800 for her damaged carpet. He also refunded her the \$898 premium she had paid to VMG approximately eight months earlier.

#### Osborne's Insurance Premium

13. Before June 13, 2003, Childress quoted rates for homeowners insurance to Veronica Osborne.

14. On June 13, 2003, Glass met Osborne at VMG. He accepted an application and a \$163.87 payment on an insurance policy because Childress was not in the office. Glass did not quote rates or sell the policy to Osborne.

15. After accepting the payment, Glass gave Osborne's application to Childress for processing. The check was deposited into the VMG business account.

16. Glass did not sell or quote rates concerning automobile insurance to Osborne.<sup>2</sup>

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<sup>1</sup>Tr. at 80.

<sup>2</sup>*Id.* at 98.

17. Osborne contacted Childress and told her that she had changed her mind and no longer wanted to pay the premiums “out of pocket,”<sup>3</sup> but wanted the premiums taken out of her escrow account with her mortgage company.

18. Childress prepared an invoice and a bill for Osborne’s mortgage company. Glass advised Osborne that he would return the \$163.87 premium paid to VMG when it started receiving the premium payments from the mortgage company. Glass planned to forward the premium payments from the mortgage company to the insurance company. Then Glass planned to return the \$163.87 premium payment to Osborne.

19. Because Glass failed to remit the initial premium, Osborne was without insurance for a period of time. Osborne filed a complaint with the Director.

20. Glass did not receive the premium funds from Osborne’s mortgage company for several months because the mortgage company mailed the check, first to the wrong address, then listed the wrong payee.

21. On or about August 29, 2003, an employee of the Valvoline Oil Change Station (“the Station”) located next to VMG’s office told Glass that there was mail for him at the Station. The mail contained the check from the mortgage company for \$665.50.

22. Glass telephoned Osborne and informed her that he had received the check and would refund her money. He refunded the \$163.87 and gave her the check for \$665.50. Glass did not deposit the \$665.50 check into VMG’s bank account, but instead remitted it to Osborne.

#### License Application

23. On May 12, 2004, Glass filed an application for a property and casualty insurance producer’s license. Glass passed the examination and paid the required fees. He also filed for renewal of his life and health license.

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<sup>3</sup>Tr. at 89.

24. By letter dated June 24, 2004, the Director denied the application for the new license and the application for renewal of the old one.

### **Conclusions of Law**

We have jurisdiction to hear this case. Section 621.045, RSMo 2000.<sup>4</sup> Section 375.141.1 sets forth the same grounds for refusing to issue or renew a license and for disciplining a license. The burden of proof for both parties is a preponderance of the credible evidence. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1993). This Commission must judge the credibility of witnesses, and we have the discretion to believe all, part, or none of the testimony of any witness. *Id.* When there is a direct conflict in the testimony, we must make a choice between the conflicting testimony. *Id.*

#### A. Discipline License

The Director has the burden of proving that Glass has committed an act for which the law allows discipline. *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

The Director argues that there is cause to discipline Glass under § 375.141, which states:

1. The director may suspend, revoke, refuse to issue or refuse to renew an insurance producer license for any one or more of the following causes:

\* \* \*

(2) Violating any insurance laws, or violating any regulation, subpoena or order of the director or of another insurance commissioner in any other state;

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<sup>4</sup>Statutory references, unless otherwise noted, are to the 2004 Supplement to the Revised Statutes of Missouri.

(4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;

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(8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]

### 1. Violating a Regulation

The Director argues that VMG violated 20 CSR 700-1.140(2)(D), which states:

Insurance producers shall remit all premium payments associated with a personal insurance policy to those persons entitled to them as soon as is reasonably possible after their receipt by the licensee, but in no event later than thirty (30) days after the date of receipt, provided, however, that premiums may be remitted at a later point in time if the licensee is so authorized under a written agreement between the licensee and the person legally entitled to the premiums. In no event, however, shall a licensee retain premium payments if to do so will result in the failure to obtain or continue coverage on behalf of an insured or prospective insured.

VMG had premium funds in its possession beyond the 30-day period without a written agreement – over 60 days in James’ case and almost eight months in Osborne’s case. Glass admits this, but blames other entities. We find that Glass and VMG were responsible for those premium payments and, for whatever reason, retained them for longer than 30 days. This resulted in the lack of insurance coverage for two people who reasonably believed that they were insured. We find cause for discipline under § 375.141.1(2) for violation of 20 CSR 700-1.140(2)(D).

### 2. Withholding Premiums

Misappropriation is “[t]he unauthorized, improper, or unlawful use of funds or other property for [a] purpose other than that for which intended.” *Monia v. Melahn*, 876 S.W.2d 709, 713 (Mo. App., E.D. 1994). Conversion is the diverting of another’s funds, by the holder of such

funds, to a purpose other than that specified by the owner. *Hall v. W.L. Brady Investments*, 684 S.W.2d 379, 284 (Mo. App., W.D. 1984).

There is evidence that VMG improperly withheld premiums received in two instances by failing to pay the premiums to the insurance companies. There is no evidence that it misappropriated or converted the funds because it did not use them at all. We find cause for discipline under § 375.141.1(4).

### 3. Practices and Conduct of Business

Incompetence is a general lack of, or a lack of disposition to use, a professional ability. *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004). The definition of “trustworthy” is “worthy of confidence” or “dependable.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2457 (unabr. 1986). Irresponsible means “not based on sound reasoned considerations . . . unprepared or unwilling to meet financial responsibilities.” *Id.* at 1196.

The Director alleged but failed to prove that Glass sold automobile insurance policies that he was not authorized to sell. The only evidence of this allegation is found in two almost identical affidavits signed by James and Osborne. In contrast, we have Glass' testimony specifically denying the conduct. In addition, we believe Glass' testimony that the premiums were not timely remitted to the insurance companies because of mistakes and that there was no intent to make other use of the money. We do not find that these two instances render him incompetent, untrustworthy or financially irresponsible. At most, he should have been more diligent in determining that the premiums were paid to the insurance companies and that the people seeking insurance actually received that insurance.

We find no cause for discipline under § 375.141.1(8).

### B. Denial of Application

The applicant has the burden to show that he or she is entitled to licensure. Section 621.120, RSMo 2000. We exercise the same authority that has been granted to the Board. *J.C. Nichols Co. v. Director of Revenue*, 796 S.W.2d 16, 20 (Mo. banc 1990). Therefore, we simply decide the application *de novo*. *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).

The Director argues that there is cause to deny Glass' application for license renewal under § 375.141 for the same reasons as cited above. "May" means an option, not a mandate. *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App., E.D. 1993). The appeal vests in this Commission the same degree of discretion as the Board, and we need not exercise it the same way. *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974).

While we have given Glass the benefit of the doubt, two people who paid him and his agency insurance premiums were without insurance because he did not ensure that the premiums were properly and timely remitted. We deny Glass' application for a new license and his application to renew his old license.

### **Summary**

We find cause for discipline under § 375.141.1(2) and (4). We do not find cause for discipline under § 375.141.1(8). We deny Glass' application for a new license and his application to renew his old license.

SO ORDERED on July 25, 2005.

  
JOHN J. KOPP  
Commissioner